STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SANTANNA NATURAL GAS CORPORATION d/b/a SANTANNA ENERGY SERVICES	)	
	)	Docket No. 02-0441
Application for Certificate of Service Authority Under §19-110.	)	

REPLY BRIEF OF THE CITIZENS UTILITY BOARD

*** * * PUBLIC VERSION * * ***

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I. Introduction

Article XIX of the Public Utilities Act ("the Act") requires an alternative gas supplier to obtain a certificate of service authority in order to serve residential and small commercial customers in the NICOR Customer Select and Peoples Energy Choices For You natural gas programs. 220 ILCS 5/19-110 et. seq. Santanna Natural Gas Corporation d/b/a Santanna Energy Services ("Santanna," "SES" or "the company") applied for a certificate pursuant to §19-110 on or about June 27, 2002.

The Citizens Utility Board ("CUB") opposes the Commission's issuance of a certificate to Santanna. As CUB argued in our Initial Brief, Santanna does not meet the managerial criteria to serve as an alternative gas supplier. CUB Initial Brief ("CUB Brief"), pp. 1-24. The company fails to comply with state and federal law in the marketing of its service offering. *Id*. at 4-14. Moreover, Santanna fails to adequately train and supervise its telemarketing and door-to-door marketing sales force. *Id.* at 14 – 24. The People of the State of Illinois, by and through the Attorney General ("AG") join CUB in urging the Commission's denial of the certificate. AG Initial Brief ("AG Brief"), p. 3. Illinois Commerce Commission Staff ("Staff") have not taken a position in this matter, yet they urge the Commission to consider the volume and type of customer complaints received by the Consumer Services Division in determining whether to grant the certificate. Staff Ex. 1.00, p. 2.

In its Initial Brief, Santanna asserts that it has satisfied the requirements of Article XIX of the Act with respect to its marketing and billing practices. Santanna Initial Brief ("SES Brief"), p. 4-6, 9-14, 26-27. As demonstrated in our Initial Brief, Santanna is not

compliant with Illinois law in this regard. To the extent necessary, we address this issue again in this reply.

The company also contends that it has complied with the Act during the 180-day grace period provided by law. SES Brief, p. 4. However, Santanna's interpretation of the alternative gas supplier law is self-serving and reaches a conclusion unintended by the legislature. We address this issue herein.

Santanna argues that it is not required to make certain disclosures and that its past marketing materials are of no consequence and should therefore be ignored in favor of its "current" marketing materials. SES Brief, pp. 9-10. We disagree. The company fails to acknowledge that its "current" materials, while improvements over their predecessors, remain inadequate under the Public Utilities Act ("the Act").

Santanna further argues that the customer complaints received by CUB, the AG and the Commission, were unsubstantiated and should therefore be given little or no weight. SES Brief, pp. 28-33. As discussed herein, this assertion flatly contradicts the position asserted by Santanna management at hearing, in pre-filed testimony and in the company's own internal documents.

Santanna's Initial Brief argues that CUB witness David Kolata's testimony should be disregarded by the Commission. SES Brief, pp. 34-36. CUB strenuously opposes Santanna's assertions as they are based upon mischaracterizations of the record, and misrepresentations of fact. We clarify and reiterate Mr. Kolata's testimony below.

Lastly, the company claims that by denying it certification the Commission will harm the competitive residential natural gas market. SES Brief, p. 36. As stated in CUB's Initial Brief, Santanna's dismal performance in the market to date significantly

harms not only its competitors, but also those consumers who will be forever soured on competition due to their negative experience with the company. CUB Brief, p. 25.

Based upon the evidence contained in the record, CUB maintains that Santanna is not managerially qualified to serve as an alternative gas supplier in Illinois' burgeoning residential natural gas market and thus the Commission should deny the requested certificate of service authority.

II. Santanna Misstates the Breadth and Scope of the Alternative Gas Supplier Law

In our Initial Brief, CUB detailed Santanna's failure to comply with §19-110 of the Public Utilities Act. CUB Brief, pp. 4-14. Specifically, CUB identified the deficiencies in Santanna's telemarketing and door-to-door sales materials, namely its scripts and contracts, and their failure to "adequately disclose prices, terms and conditions of service" as required under the Act. 220 ILCS 5/19-115. *Id.* Moreover, CUB demonstrated that Santanna's marketing efforts are violative of not only the Illinois Telephone Solicitation Act, but also the Illinois Consumer Fraud and Deceptive Business Practices Act and the federal Telemarketing Sales Rule (16 CFR part 310) (implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101-6108).[1] CUB Brief, pp. 8-9, 12-14.

Santanna claims that it has satisfied the requirements of Article XIX (the Alternative Gas Supplier Law). SES Brief, pp. 4-8. However, Santanna grossly misinterprets and misstates its statutory obligations. Specifically, Santanna erroneously argues that the statute's 180-day grace period affords it, and other similarly situated companies, six months within which to workout the kinks in its service offerings. SES

[1] As noted in CUB's Brief, Santanna's telemarketers were located throughout the country, thereby triggering the applicability of federal telemarketing laws. CUB Brief, p. 17, note 7.

Brief, pp. 4-5. This self-serving and unsustainable argument contravenes the express purpose of this statutory provision. The company also attempts to expand the meaning given to other statutory language such as that contained in §19-115 regarding adequate disclosure of prices, terms and conditions. Santanna's interpretations are untenable and should be disregarded.

A. Santanna's Interpretation Of The 180-day Grace Period Is Flawed And Contravenes The Statute's Intended Purpose

Article XIX of the Act was enacted on or about February 8, 2002. As the Commission is well aware, NICOR's customer choice program not only pre-dates the existing law[2], but is also the reason for the law. The law provided 180 days for companies already participating in the program to obtain the newly required certificate of authority in order to **continue** operating as an alternative gas supplier. 220 ILCS 5/19-110. Section 19-110 of the Act states in pertinent part:

> (b) An alternative gas supplier must obtain a certificate of service authority form the Commission in accordance with this Section before serving any customer or other user located in this State. An alternative gas supplier may request, and the Commission may grant, a certificate of service authority for the entire State or fore a specified geographic area of the State. A person, corporation, or other entity acting as an alternative gas supplier on the effective date of this amendatory Act of the 92nd General Assembly shall have 180 days from the effective date of this amendatory Act of the 92nd General Assembly to comply with the requirements of this Section in order to continue to operate as an alternative gas supplier.

220 ILCS 5/19-110(b). A plain reading of this statutory language clearly demonstrates that: 1.) the words "this Section" pertain solely to Section 19-110 of the Act which sets forth the requirements for certification of alternative gas suppliers; and 2.) the 180-day

[2] See Transcript of 92nd General Assembly, November 28, 2002, House of Representatives floor debate regarding Senate Bill 694 (enacted as Article XIX of the Public Utilities Act 220 ILCS 5/19-110 et. seq.). Peoples Energy/North Shore Gas' programs began in May 2002.

grace period was intended to grandfather those suppliers that were in operation prior to the enactment of the statute. While §19-110 affords suppliers a grace period within which to comply with the certification requirements of that section, none of the remaining sections of this article contains such a period, therefore those sections are properly applicable to any alternative gas supplier regardless of certification status. If the legislature had intended that a 180-day grace period apply to any other portions of the alternative gas supplier law, the General Assembly would have used the term "this Article" instead of "this Section." *See generally,* §19-100 (referencing short title for "this Article"); §19-105 (referencing definitions for purposes of "this Article"). *See also,* §13-101(referencing specific provisions of "this Article").

Santanna argues that the "plain language" of the law permits the company 180 days to become compliant with its customer obligations under §19-115. SES Brief, p. 4. This self-serving interpretation of the law is unsupported by the statutes' plain language. Certification is the compliance sought by this provision and the grace period is, and always has been, a certification grace period and nothing more. We note also that a literal interpretation of the Act required Santanna to be **certified** no later than August 8, 2002, upon expiration of the 180-days, which it was not.[3] Obviously, Santanna only supports "plain language" interpretations to the extent that they favor Santanna's positions.

Contrary to Santanna's baseless assertions, the 180-day grace period is not a six-month allowance for "growing pains." SES Brief, p. 5. Nor should Illinois consumers suffer the pains of Santanna's growth. As aptly stated by the AG, Illinois consumers are

[3] Over CUB's objection, the Commission extended Santanna's application review period by 45 days. *See*, Administrative Law Judge's Ruling and Notice of Hearing, dated July 19, 2002.

not "guinea pigs" in Santanna's residential natural gas experiment gone awry. AG Brief, p. 11.

Santanna also asserts that they should not be penalized for offering service within the 180-day grace period. SES Brief, p. 37. Santanna is mistaken. No party has asked the Commission to penalize the company for offering service prior to certification. CUB is asking the Commission not to grant Santanna the privilege of participating in the Illinois residential natural gas market based upon their contemptible customer service, repeated failure to comply with state and federal law and unacceptable dearth of managerial capability. *See generally* CUB and AG Briefs.

Regardless of the certification grace period, Santanna, as a participant in the customer choice programs, was, and is, required to conform to the Participating Supplier Standards of Conduct prescribed for those programs. These Standards of Conduct were introduced in NICOR's Customer Select pilot program, and later codified as §19-115 (obligations of alternative gas suppliers) of the Public Utilities Act. ICC Docket 00-0620 and 00-0621 consolidated. As CUB and the AG demonstrated in their initial briefs, Santanna has failed to comport with these standards. CUB Brief, pp. 4-12; AG Brief, pp. 31-37. Accordingly, the Commission should disregard Santanna's feeble attempts to contort statutory construction to meet their objectives. Santanna is mistaken as to the scope and intent of §19-110(b) and was obligated to meet the requirements of §19-115 at all times that it served residential customers in this State.

B. Santanna Misstates Its Marketing and Billing Disclosure Obligations

Section 19-115 of the Public Utilities Act requires all alternative gas suppliers to make adequate disclosure of prices, terms and conditions of service in its marketing

materials and in any written materials given to a customer prior to switching that customer from its incumbent to an alternative gas supplier. 220 ILCS 5/19-115(f)(1-2). This section also requires that all itemized billing statements describe the products and services, and prices thereof, being offered to the customer. 220 ILCS 5/19-115(f)(3)(A).

Santanna argues that *adequate* disclosure, under the Act, is the same as *meaningful* disclosure. SES Brief, p. 18. Not only is the word meaningful not contained in §19-115, but also, the company offers absolutely no support for this contention. *Id.* By this assertion, Santanna abandons its earlier arguments regarding statutory interpretation, i.e., the Commission must give the statute its plain meaning and not impose additional interpretations upon the language contained therein. SES Brief, p. 4. Additionally, the company argues that the marketing and billing disclosure urged by CUB exceeds the disclosure required by statute. SES Brief, pp. 17-19. As stated in our Initial Brief, Santanna's customer disclosures, whether past or present, are unsatisfactory under §19-115.

The word adequate is synonymous with sufficient, satisfactory or enough. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Edition, 2000). Adequate is defined as "being as much as needed" and "sufficient to satisfy a requirement or meet a need." *Id.* In the context of §19-115, adequate disclosure most obviously means providing enough information for a consumer to be sufficiently apprised of the prices, terms and conditions of an alternative gas supplier's service offering.

Widely accepted principles of statutory interpretation require that "[w]hen the language of the statute is clear and unambiguous, it will be given effect without resort to other tools of construction." *Gem Electronics of Monmouth, Inc. v. Department of*

Revenue, 183 Ill. 2d 410, 475, 702 N.E. 2d 529, 532 (1998).[4] Indeed, the very case upon which Santanna relies, *In re D.D.*, clearly states, "[**o]nly** when the meaning of the enactment cannot be ascertained from the language may a court look beyond the language and resort to aids for construction." *In re D.D.*, 196 Ill. 2d 405, 419; N.E. 2d 112, 1120 *citing Gem Electronics of Monmouth, Inc. v. Department of Revenue*, 183 Ill. 2d 410, 475, 702 N.E. 2d 529, 532. (Emphasis added). Accordingly, an analysis of legislative intent is not only unwarranted but improper.[5]

Santanna misrepresents CUB's position regarding the company's disclosure requirements. SES Brief, p. 17. CUB does not claim that Santanna must specifically describe its program as a "physical hedge" and explicitly use those terms. *Id.* Instead, CUB states that none of Santanna's marketing materials "does an *adequate* job of describing the prices and terms of the hedging service the company provides." CUB Ex. 1.0, p. 8 (Kolata Direct). (Emphasis added). CUB witness David Kolata's testimony clearly states that Santanna "needs to explain to customers how its storage program differs from the incumbent utility's program and justify the claim that 'SES's storage program is a significant part of your savings potential.'" *Id.* Such an explanation provides customers with sufficient material upon which to base an informed choice.

Mr. Kolata also suggests that Santanna inform prospective customers of how much their bills will increase in the summer and provide data in support of the alleged "savings" the customer will experience under Santanna's program. *Id.* Once again,

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[4] *citing* People v. Woodard, 175 Ill. 2d 435, 443; 677 N.E. 2d 935 (1997).

[5] We note too that Santanna repeatedly cherry picks court decisions for "favorable" language but ignores language in the same case that disfavors its contentions. For example *In re D.D*, clearly states that an analysis of legislative intent is **not** the starting point in statutory analysis where the statute is clear on its face. Santanna conveniently omits this from its discussion of the proposition for which the case stands.

Santanna not only misrepresents CUB's position but also misses the point. The company argues that CUB wants it to "over-disclose." SES, Brief, p. 18. This could not be farther from the truth. CUB wants customers to be informed enough to understand the choice offerings and choose a program that meets their needs. Indeed, this is what the law contemplates. Santanna's limited and vague disclosures do not meet this standard. Bizarrely, the company argues that ". . . the lack of customer complaints on these issues demonstrates the lack of need for such over-disclosure."[6] SES Brief, p. 18. Following Santanna's reasoning to its logical conclusion then, only if a customer complains should the complained of information be disclosed. In fact, this seems to have been the company's tenet, as evidenced by its repeated revision of scripts and contracts over a five-month period. CUB Brief, pp. 5-14; AG Brief, pp. 14-20; Staff Brief, pp. 4-5; Tr. 137, 140, 147, 150-151, 209, 214, 217, 219, 222.

1. Santanna's Billing Disclosures Are Inadequate

Santanna contends that its billing disclosures are sufficient. SES Brief, pp. 26-27. This position is negated by the company's need to describe the billing terms in a welcome letter sent to customers subsequent to enrollment.[7] SES Brief, p. 16; Santanna Ex. 1.0 (Gatlin Rebuttal), App. 1.04. Indeed, this supports Mr. Kolata's opinion that"[t]he Santanna portion of the bill issued by NICOR Gas is confusing," otherwise there would be no need to explain it. CUB Ex. 1.0, p. 10 at line 13. While CUB is aware that Santanna does not issue its own statement, Santanna is nonetheless responsible for the

[6] In contradiction to this assertion, Santanna also argues that customer complaints are inherently suspect, untrustworthy, and should be given little, if any weight. SES Brief, p. 31.

[7] The letter (which began circulating on July 9, 2002) attempts to clarify the meaning of the terms "Gross Gas Sales," "Beg," "End," and "Flow," which are **not** defined on Santanna's billing statement. See Santanna Ex. 1.0 (Gatlin Rebuttal), App. 1.04.

information contained in the portion of the bill that pertains to Santanna's services. Tr. 386.

Mr. Kolata correctly demonstrates that the total number of therms billed to a consumer is not equal to the total number of therms available for use by that customer under Santanna's storage program. CUB Ex. 1.0 (Kolata Direct), pp. 9-10. Santanna argues that applicable tariffs "allow utilities to 'deduct' a certain volume of gas that dissipates in the pipelines," (SES Brief, p. 27) and therefore there is no need to have "Gross Gas Sales" equal "Flow." *Id.* The company rejects Mr. Kolata's billing statement opinions. SES Brief, pp. 26-27. But without an explanation, from Santanna how are customers to understand the discrepancies between these two categories?

Section 19-115(f)(3) requires that the **billing statement** describe the company's products and services, not that an additional document do so. 220 ILCS 5/19-115(f)(3)(A). The bill statement does not define the terms used therein. *See* CUB Ex. 1.0 (Kolata Direct), App. 5. *See also*, Santanna Ex. 1.0 (Gatlin Rebuttal), App. 1.18. Tr. 386-388. The company argues that limited space prevents it from doing so, but Santanna has the ability to choose language that comports with Illinois law by both describing its products and services and informing consumers, in plain language, of the price of service.

2. Santanna's Current Customer Materials Remain Deficient

The company also maintains that its current welcome letter and script inform customers that they should see higher summer bills and lower winter bills than those they are accustomed to seeing. SES Brief, pp. 16-18. However, Santanna does not explain which months constitute summer and winter under its program, nor does it explain exactly how much higher than normal the summer bills will be. The record reflects

customers reporting having been charged anywhere from six to more than 20 times their actual therm usage[8]. CUB Brief, pp. 8-9; CUB Ex. 1.0 (Kolata Direct), pp. 9-10, App. 5, AG Ex. 1.00 (Hurley Direct), App. 1.01 at AG 030-32, AG 033-37; Santanna Ex. 1.0 (Gatlin Rebuttal), Apps. 1.21 and 1.22. Customers should be prepared for this eventuality under Santanna's program, and it is Santanna's legal obligation to inform them thereof. Santanna's unwillingness to satisfactorily educate its prospective consumers contravenes §19-115.

We note too, that on the one hand Santanna complains that CUB did not review its revised documents and comment upon them. SES Brief, p. 12. While on the other, the company rejects Mr. Kolata's identification of flaws in the revised materials as "not required," or "baseless." SES Brief, p. 18. Santanna should make up its mind. Either it wants CUB's suggestions for changes that would bring its materials into compliance or it does not. Obviously the company only desires those suggestions that it favors, but the record fully demonstrates that Santanna lacks sound judgment with respect to the development of its marketing materials. CUB Brief, pp. 4-14; AG Brief, pp. 11-21.

III. Consumer Complaints Regarding Santanna Establish A Pattern And Practice Of Poor Managerial Ability

In our Initial Brief, CUB describes the patterns established by the more than 2,000 customer complaints on record with CUB, AG and Staff, as well as the more than 5,500 contained in Santanna's internal documents. CUB Brief, p. 2-4, 15-17, 20-23. *See also*, AG Stip. Ex. 1. Santanna argues that the customer complaints are inherently

[8] *See*, for example, CUB Ex. 1.0 (Kolata Direct), App. 2, pp. 20 (customer used 37 therms, billed 287 therms—7.75 times more therms than actual usage), 31 (29 therms used, billed 512 therms—17 times actual usage), 54 (customer used 4.04 therms bill totaled $207.00), 58 (customer used 122.21 therms, billed 778 therms—6.3 times usage), 113 (customer used 21 therms, billed 419 therms—nearly 20 times usage), 124 (customer used 18.81 therms, billed for 405—21.5 times actual usage), 126 (used 36, billed 283 therms—7.8 times usage). *See generally*, Apps. 3 and 5 to CUB's Motion To Stay filed in this docket and App. 1 to CUB Ex. 1.0 (Kolata Direct)

untrustworthy and should be accorded little, if any, weight by the Commission. SES Brief, 24-31. However, if we were to assume that all consumer complaints were untruthful and "inherently suspect," as Santanna suggests, there would be no need for the Commission, or any other agency with responsibility for consumer protection, to exist. SES Brief, p. 31. Interestingly, Santanna makes its argument after suggesting that CUB and other parties are neglecting their consumer protection responsibilities by not providing Santanna with feedback regarding its marketing materials. SES Brief, p. 12. Santanna fails to see that by acting upon consumer complaints, CUB, the AG and Staff are fulfilling their obligations to Illinois consumers. Indeed, the Consumer Protection Division of the Attorney General is required to forward customer complaints that reveal a pattern of bad business practices, to the litigation unit, which it did in the instant case. Tr. 475, 491-493.

Santanna contends that the customer "allegations remain unsubstantiated" and "lack foundation." SES Brief, pp. 28-31. This argument flies in the face of its President's testimony to the contrary. According to Mr. Gatlin Santanna *does not* operate upon the assumption that customer complaints are untrue. Tr. 191. Indeed, Doug Cueller, Santanna's Vice President of Midwest Operations, asserts "[c]ommon complaints are the ones that scare me, cause that means the customer is probably not making them up." CUB Ex. 2.0, App. 1 (SES ICC 182). Apparently the company has changed its position.

CUB's Initial Brief cited numerous instances in which customers alleged, and Santanna's records or employees confirmed, that its marketing representatives were employing deceptive practices in order to obtain confidential customer information and signatures, in order to enroll prospective customers on Santanna's behalf. CUB Brief, pp.

5-6; 19-23. *See also,* AG Brief, pp. 16-24. These allegations consist of Santanna representatives: posing as NICOR representatives, encouraging customers to sign fictitious "surveys," "petitions," or "rebate" forms under the guise of gas costs savings, and taking customers' gas bills. CUB Brief, pp. 17-23; AG Brief, pp. 19-21; Staff Brief, pp. 6-7.

Santanna takes issue with the fact that neither CUB nor the AG produced customer witnesses during the evidentiary proceedings. SES Brief, p. 32. However, by Santanna's own admission, "it is of course, unrealistic to expect [CUB, the AG and Staff] to produce at hearing, subject to cross-examination, many of the consumers who registered complaints." SES Brief, p. 33. This is particularly true in light of the fact that the hearings were held in Springfield while the affected consumers largely reside in and around the Chicago metropolitan area. Nonetheless, Santanna persists in its argument.

The company also points to the fact that nearly 38,000 customers remain with Santanna although "some" customers cancelled, as though this indicates that its service offerings were clear. SES Brief, p. 17. In fact, nearly 14,000 customers terminated service with the company.[9] AG Brief, pp. 10, 36. These numbers alone are cause for concern. More than one-quarter of Santanna's customers cancelled service within just a few short months (and in some cases days) of being enrolled. AG Stip. Ex. 1. *See generally,* CUB Ex. 1.0 (Kolata Direct), Apps. 1 and 2; Apps. 3 and 5 to CUB's Motion to Stay; AG Ex. 1.0, App. 1.01. These numbers, combined with the patterns revealed in the customer allegations, warrant concern on the part of CUB, the AG and the Commission.

[9] *See also*, Santanna Ex. 1.0 (Gatlin Rebuttal), p. 4 (38,027 customers as of August 22, 2002). 52, 000 customers enrolled. Tr. 92. This represents a net of 14,000 customers who cancelled service as of the filing of Mr. Gatlin's testimony.

Santanna's arguments are based on the flawed premise that customers cannot be trusted. SES Brief, p. 31. The company even accuses CUB's counsel of acknowledging this and suggesting, "that the allegations cannot be taken as true." SES Brief, p. 32. This is a deliberate misstatement of fact. Indeed, the discussion upon which Santanna bases this assertion pertained to questions counsel asked of Santanna's witness and to Santanna's objections to the admissibility of certain evidence. Those questions were framed in the context of customer allegations, but by no means did CUB's counsel or any other CUB representative assert that the allegations cannot or should not be taken as true. Tr. 252-253. The portion of the transcript cited by Santanna bears this out.

Judge Albers:	Let me ask you this, are you offering this, just so I am clear, to demonstrate the intention that these particular complaints be taken as true, as having actually happened?
Counsel :	No. And I believe if we had the opportunity to go back to look at my line of questioning around this, my questions – I can go through my outline – my questions regarded allegations and Santanna's awareness of allegations and allegations of different types. . . .
Judge Albers:	That's the way I recall it happening, but I wanted to be clear, though as to how you are offering it right now. You are offering it as the types of allegations that Santanna received?
Counsel:	Correct, or was aware of and may have responded to and acted upon, and I believe that is consistent with the line of questioning that I engaged the witness in, Your Honor.

Id. This constitutes yet another instance of Santanna misrepresenting and mischaracterizing the record in this matter.

Santanna also argues that it disproved the allegations contained in some CUB complaints. SES Brief, p. 22. But, a closer look at the record reveals that Santanna in

fact bolstered CUB's and the AG's position that Santanna's materials and marketing efforts omitted essential information, thereby needlessly creating customer confusion.

A. Santanna Did Not Prove That It Adequately Supervised Its Marketers

Despite its assertions, Santanna did not prove that it adequately supervised its marketers. In our Initial Brief, CUB proved that Santanna failed to sufficiently respond to customer complaints regarding deficiencies in its telemarketing program. CUB Brief, pp. 14-24.

The record reflects that Santanna did not regularly travel to its call center sites as it asserts. SES Brief, p. 19. Instead, according to Mr. Gatlin, Santanna traveled to **one** center prior to initiating its marketing efforts. Tr. 154-155. Further, Mr. Gatlin was unable to address whether the company engaged in regular travel to the telemarketing center in order to address the sales force or participate in training. *Id.* at lines 10-13. The record reflects that Santanna utilized ten different telemarketing firms located throughout the country. CUB Brief, p. 14, note 7. One visit to one center does not adequate oversight make. Moreover, the company is unable to identify how frequently it listened in on marketing calls for the purpose of quality assurance. CUB Brief, pp. 15; AG Brief, p. 26-29; Tr. 158, lines 14-19. The record also reflects Santanna's unfamiliarity with the quality assurance practices of its marketing agents. CUB Brief, p. 16-17; CUB Cross Ex. 17 (SES ICC 209-214).

Santanna shrewdly argues that it "continued utilizing its telemarketers, even after *some* complaints arose." SES Brief, p. 29. (Emphasis added). This understatement is overshadowed by the more than 5,500 complaints/cancellations that Santanna internally received, more than 2,100 of which occurred during the month of July alone. AG Stip.

Ex. 1. Indeed, these numbers only represent those customers that were actually able to reach the company in order to cancel.

B. Santanna Did Not Prove That It Adequately Supervised Its Door-To-Door Marketers

Santanna argues that it adequately supervised its door-to-door sales representatives but CUB, the AG and Staff demonstrated otherwise. CUB Brief, pp. 17-23; AG Brief, pp. 16-22; Staff Brief, pp. 6-7. First, Santanna permitted its marketing companies to alter the contract forms used to enroll customers. CUB Brief, pp. 18-19; AG Brief, pp. 14, 16-19, 34. Next, the company permitted its agents to misrepresent the purpose of their customer contact, or misrepresent themselves as utility employees, and enroll customers with Santanna under false pretenses. CUB Brief, pp. 19-23. Santanna argues that this behavior was limited, but the volume of customer complaints received to date betrays this assertion. CUB Brief, p. 19-23; AG Brief, p. 19-24; Staff Ex. 1.00 (Howard Direct), p. 7; AG Ex. 1.00, App. 1.01 at AG 130-131; AG Stip. Ex. 1 at NICOR 1067, 1195, 1286. Ultimately, although free to do so, Santanna declined to terminate its business relationship with these marketers until more than five months after the marketing efforts began. CUB Brief, pp. 23-24; AG Brief, p. 22-24; AG Cross Ex. 4 (SES ICC 370, ¶4); Tr. 182.

Santanna freely acknowledges, with respect to its door-to-door sales force "[w]e had no structured monitoring in place, other than dealing with the management of the company on a routine basis . . ." Tr. 198. The company cannot now argue that it adequately supervised the representatives, their uniforms or their conduct. Moreover, the record reflects that Santanna was unable to verify what its marketers wore, and Mr. Galtin himself lacked personal knowledge of this, other than through having viewed

photographs of allegedly uniformed marketers. *Id.* As for what occurred in the field, only Santanna's customers can accurately say, since the company itself did not send individuals into the field to monitor its agents. This, despite the fact that although the agents were employed by out-of-state companies, their work was being performed in and around the Chicago area. There is no excuse for Santanna's management neglecting to monitor these individuals while they were literally in the company's backyard. CUB Brief, p. 14.

In its brief, Santanna asserts that it required one of its agents to suspend its efforts and retrain staff (SES Brief, p. 21) but when cross-examined on this issue, Mr. Gatlin was unable to say whether this retraining was indeed done at Santanna's behest. Tr. 205-206. It is insufficient to retrain only one marketing firms' sales people, when at least two firms had been identified as having serious problems. CUB Brief, p. 20; Tr. 165-173.

The company also asserts that support for its contention that it placed marketing companies on probation and disciplined individual marketers can be found in Ex. 1.17 to Santanna Ex. 1.0 (Gatlin Rebuttal). However, this exhibit contains no such reference. In fact, the record reflects that Santanna did not place companies on probation; it merely threatened to terminate the business relationship, but never took steps to do so. CUB Brief, pp. 23-24; CUB Cross Ex. 10 (SES ICC 165); AG Brief, pp. 22-24; Tr. 182.

Finally, Santanna's suggestion that customers who were fraudulently enrolled could "simply switch back" is defeated by the overwhelming complaints regarding Santanna's call center. AG Brief, pp. 25-26; Staff Brief, pp. 4-5. In fact, customers' inability to reach Santanna so troubled the ICC that Commission Staff have suggested

implementing call center requirements for Santanna in the event that it is certified. Staff Ex. 1.00 (Howard Direct), p. 10; Tr. 511; AG Brief, p.25-26; Staff Brief, p. 4-5, 8.

C. Santanna Did Not Disprove The Slamming Allegations

During evidentiary hearings in this proceeding, Santanna attempted to disprove the veracity of some customer complaints. SES Brief, pp. 22-23. It now argues that it accomplished this task, but the record reflects otherwise. *Id.*

On or about July 22, 2002 CUB received a complaint call from * * * .* * * According to the complaint, Mrs. * * * * * * stated that "she never wanted Santanna. She wants to cancel with Santanna and wants her money back." Santanna Redirect Ex. 1. Santanna provided the transcript of a verification recording involving * * * * * *, presumably * * * * * * husband. Santanna Redirect Ex. 2. The verification does **not** involve the complainant. Additionally, the verification is dated April 10, 2002, which corresponds with Santanna's use of its first marketing and verification scripts, both of which have been shown to lack the essential terms of Santanna's service offering, i.e., information regarding the storage program, the company's manner and method of billing, cancellation period, or early termination fee. CUB Brief, p. 5; AG Brief, p. 26-31. Moreover as indicated in our Initial Brief, the script instructs the telemarketer to ascertain confidential customer information, such as meter and account number, (or in the absence thereof, the last four digits of the customer's social security number, and telephone number, as was the case in this instance) **prior** to disclosing the purpose of the call. CUB Brief, p. 5.

What Santanna proves with these materials, is the following: 1.) the customer was not adequately informed about the program; 2.) one spouse enrolled the household

account while the other spouse lodged a complaint regarding her desire to cancel and receive a refund, presumably for the high charges contained on her bill; and 3.) Santanna violated federal and state law. *See* CUB Brief, pp. 4-5, 7-9.

Santanna's second poor attempt at disproving the veracity of a CUB complaint was similarly fruitless. Santanna Cross Exhibit 6 contains the CUB complaint of * * * * * * which states in pertinent part, "[c]aller does not remember ever authorizing a switch to Santanna." Santanna Cross Ex. 6. Santanna produced the transcript of the verification recording for * * * . * * * Santanna Cross Ex. 7. This recording occurred on March 20, 2002, again during Santanna's use of its first marketing and verification scripts. Contrary to Santanna's assertions, the verification does not disprove the CUB complaint. In fact, the verification illustrates that the customer may very well have been confused over the program in which she was enrolling due to the fact that the verification contained eight mentions of NICOR and only four of Santanna. Santanna Cross Ex. 7; Tr. 424-427. Moreover, as described above, Santanna used legally insufficient marketing materials in securing the customer's enrollment. CUB Brief, p. 4-5, 7-9; AG Brief, p. 26-32.

With respect to the two other customers identified by Santanna, each signed an affidavit indicating that they did not sign the contract produced by the company. Santanna Cross Exs. 4 and 5. In fact, one customer clearly recalled having signed a document resembling a petition, with other signatures on it. Santanna Cross Ex. 5. And the other recalled signing a piece of paper with signature lines. Santanna Cross Ex. 4. These statements are consistent with the allegations contained in the more than 2,000 complaints lodged with CUB, the AG, and ICC Staff, as well as those complaints

identified in the record as AG Stipulated Exhibit 1. Santanna can offer no explanation for these allegations other than to question the complainants' veracity. Customers have nothing to gain by fabricating stories about Santanna. Moreover, Santanna cannot prove that customers from across its service territory conspired together to denigrate it.

Santanna's arguments regarding customer complaints should fall on deaf ears. The allegations are consistent from agency to agency. Also, the number, scope and breadth of the complaints are overwhelming. Illinois consumers deserve better service quality and quality assurance than that offered by Santanna. The Commission must reject these last ditch efforts to gain certification at consumers' expense. If the company is unwilling to acknowledge the depth of its customer service and marketing problems, how can it sufficiently address these issues in order to redress customer harm? To date, Santanna has continually downplayed the significance and number of customer complaints.[10] This is unacceptable and not characteristic of prudent management.

IV. Mr. Kolata's Opinions Are Fully Supported By The Record

In his pre-filed testimony, CUB witness David Kolata discussed the nature and volume of complaints regarding Santanna, the company's inadequate disclosure of terms, prices and conditions of service and the dubious benefits of Santanna's storage program. *See generally*, CUB Exs. 1.0, 2.0 (Kolata Direct and Rebuttal).

Santanna's Initial Brief repeatedly misrepresents and mischaracterizes Mr. Kolata's testimony in an effort to draw the Commission's attention away from the company's failings. SES Brief, pp. 34-36. Further, Santanna's efforts to discredit Mr. Kolata's ability to testify as a witness are moot. The Administrative Law Judge, the trier

[10] *See*, SES Brief, pp. 17-20 (references "some" cancellations, in reality nearly 14,000; "some" complaints, more than 5,500 in Santanna's records for the month of July). AG Brief, p. 10.

of fact in this proceeding, duly admitted Mr. Kolata's testimony with no limitations. As we argued at hearing, the ALJ is free to weigh any and all testimony as he sees fit. To now argue that Mr. Kolata is not an expert when the judge has already admitted his opinion testimony is a waste of Santanna's, CUB's and the Commission's time.

At no point did Mr. Kolata state that Santanna intended to defraud customers. SES Brief, p. 35. He stated that Santanna engaged in a fraudulent practice—slamming. CUB Ex. 1.0 (Kolata Direct), p. 4. This fact has been proven. CUB Brief, p. 19-23; AG Brief, p.20-24; Staff Brief, pp. 6-7.

Mr. Kolata's opinion that nearly 7,000 of Santanna's customers cancelled prior to receiving service, more than likely due to Santanna's failure to disclose material terms, is in fact, borne out by the record in this proceeding. Even Santanna's President admits that the single largest complaint among Santanna customers was the company's failure to adequately disclose the storage aspect of its service offering. Tr. 125, 280. CUB's customer complaints revealed this same trend, and Mr. Kolata acknowledged reviewing customer complaints in this proceeding. Tr. 401. *See also*, CUB Ex. 1.0 (Kolata Direct), Apps. 1 and 2. Santanna argues that Mr. Kolata's reliance upon those complaints was mistaken, but as explained above, it is CUB's responsibility to address and respond to consumer complaints. *See* discussion, *infra*, §III. Additionally, CUB's customer complaints are analogous to, but far fewer in number than, those logged by Santanna for the month of July alone. AG Stip. Ex. 1.

Lastly, Santanna alleges that CUB contributed to the high number of cancellations the company received. SES Brief, p. 35. This is based purely on speculation and is belied by the fact that Santanna began receiving complaints as early as March (AG Stip.

Ex. 1), regarding its failure to disclose material terms. Furthermore, Santanna ignores the fact that the influx of complaints also corresponded with customers' receipt of their first bills under both the NICOR and Peoples Gas programs. *See* affidavit Martin S. Nava, attached as App. 1 to CUB's Verified Complaint filed June 18, 2002 in ICC Docket 02-0425.

V. Conclusion

As stated in our Initial Brief, Santanna's brief foray into the residential natural gas market has been disastrous at best. The company repeatedly references its longevity and success in the Illinois commercial and industrial market, but it is clear that neither has positively influenced Santanna's practices under the residential customer choice programs. Santanna's Brief contained many flawed arguments, misrepresentations and misstatements of fact. CUB has demonstrated, and the record reflects, Santanna's: excessive billing and fraudulent marketing practices, lack of customer access, dilatory cancellation of service and refunding of credits, and pattern and practice of enrolling customers without their consent.

The record reflects that Santanna lacks the necessary managerial abilities and resources to serve as an alternative gas supplier. We have also demonstrated that the company failed to adhere to state and federal law in marketing its program and that it failed to adequately supervise its sales force. Moreover, Santanna fails to adequately disclose prices, terms and conditions of service as required by law—items that would enable prospective customers to make an informed choice when selecting a natural gas supplier.

Based upon the arguments raised and refuted herein, as well as those contained in our Initial Brief and in pre-filed testimony, CUB respectfully requests that the Commission reject Santanna's application for a certificate of service authority.

Respectfully submitted,

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